In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-863

MICHAEL LEO FIORELLA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of New York, petitioners were convicted of having conspired in violation of 18 U.S.C. 371 to conduct an illegal gambling business prohibited by 18 U.S.C. 1955.[1] All received two-year suspended sentences and were fined in various amounts.[2] The court of appeals affirmed (Pet. App. A).

[1] Petitioners were acquitted of the substantive offense of having conducted an illegal gambling business in violation of 18 U.S.C. 1955.

[2] The fines imposed were as follows: Michael Leo Fiorella, $5,000; A. Richard Fiorella, $1,000; John Porcello, Anthony Pizzutelli and Alfred Rivoli, $300; Angelo Alfano and James Communale, $200; Clifford Carll, $150.

494-214—73

On March 1, 1971, former Attorney General
ell personally initialed a memorandum to As
Attorney General Will Wilson approving a r
for authorization to apply for a wiretap on tele
number 716–232–5191 located at 84 Cleveland
Rochester, New York, in connection with an i
gation into possible violations of 18 U.S.C. 19
371 by "Alfred Rivoli, Michael Fiorella, Joh
cello, Clifford Carll, Anthony Pizzutelli, R
Grock, and others unknown" (R. App. 156–15

Following the Attorney General's approv
United States Attorney for the Western District
York was notified that same day that h
authorized to request the wiretap. That notif
was contained in a letter bearing the name of As
Attorney General Wilson (R. App. 26) but app
signed by a member of Wilson's staff.[4] On March
the United States Attorney applied to the United
District Court for the Western District of Ne
for a wiretap order (R. App. 20). In support of
plication, an affidavit was submitted from F.B.I
Evans, who personally conducted the investiga
possible gambling violations by petitioners. Ev
scribed the reasons for his belief that petitioners
Michael Fiorella, Porcello, Carll, Pizzutelli, or
ard Grock and "others as yet unknown" were c
ing an illegal gambling business (R. App. 28).

[3] "R. App." refers to the Appendix on appeal, a copy
we are lodging with the Clerk of this Court.

[4] The record does not reveal the name of the staf
who affixed Wilson's signature to the authorization
App. 132, 137, 140; Pet. App. A–4, note 3).

reasons included, *inter alia* (1) information from a reliable informant to F.B.I. Agent Joensen on August 14, 1969, that a friend of the informant, petitioner Rivoli, was then working for petitioner Michael Fiorella in a Rochester, New York, bookmaking operation; (2) subsequent information from this same informant to Joensen on February 19, 1971, that Rivoli told the informant earlier in February that he, petitioners Porcello, Carll and Pizzutelli, and Richard Grock, were currently working in Fiorella's bookmaking operation, which used the telephone number 716–232–5191, and that the take from this bookmaking operation exceeded $10,000 per day; (3) information from a second reliable informant to F.B.I. Agent Higgins on December 14, 1970, that petitioner Rivoli, a long-time friend of the informant, had accepted bets from the informant over telephone number 716–232–5191; (4) telephone company records indicating that telephone number 716–232–5191 had apparently been subscribed to by a person using a fictitious name; (5) F.B.I. physical surveillance from December 1970 through February 1971 of 84 Cleveland Street, where the above-numbered telephone was installed in an upstairs apartment, which revealed that petitioners Porcello, Carll, Pizzutelli and one ~~John~~ Richard Grock were consistently seen entering and leaving the above apartment and were then frequently seen entering one of Michael Fiorella's two businesses located nearby (R. App. 30–32).

On March 3, 1971, District Judge Burke authorized a fifteen-day wiretap to "[i]ntercept wire communica-

tions of Michael Fiorella, John Porcello, Clifford Carll, Anthony Pizzutelli, Richard Grock, and Alfred Rivoli, and others from telephone facilities carrying numbers 716–232–5191, located in the second floor apartment of 84 Cleveland Street, Rochester, New York * * *" (R. App. 18). The wiretap, which ran for eleven days and disclosed that petitioners were accepting wagers and giving out betting information, provided much of the government's evidence at trial (Pet. App. A–3).

1. Petitioners contend (Pet. 6–14) that the wiretap application, which was personally approved by Attorney General Mitchell, was not properly authorized as required by 18 U.S.C. 2516(1) because neither the Attorney General nor Assistant Attorney General Wilson signed the letter to the United States Attorney notifying him that he was authorized to make the application to the district court. However, as noted in our brief in opposition in *United States* v. *Cox,* petition for a writ of certiorari pending, No. 72–5278,[5] all the courts of appeals which have considered similar fact patterns have agreed that the personal approval of the wiretap application by Mr. Mitchell constitutes full compliance with the requirements of 18 U.S.C. 2516(1).[6] Because the Attorney General personally

[5] We are furnishing to petitioners' counsel a copy of our brief in opposition in *Cox.*

[6] See *United States* v. *Ceraso,* 467 F. 2d 653 (C.A. 3); *United States* v. *Cox,* 462 F. 2d 1293, 1297–1300 (C.A. 8); *United States* v. *Becker,* 461 F. 2d 230, 235 (C.A. 2), petition for a writ of certiorari pending, No. 72–158; *United States* v. *Pisacano,* 459 F. 2d 259, 263 (C.A. 2), petition for a writ of certiorari pending, No. 71–1410.

In *United States* v. *Giordano,* Nos. 72, 1399 and 72–1407 (C.A. 4), decided October 31, 1972, in which the government is pe-

approved the application, it is irrelevant whether the ministerial act of sending a letter notifying the United States Attorney of the authorization was signed by Assistant Attorney General Wilson or by a member of his staff. *United States* v. *Cox, supra,* 462 F. 2d at 1300.

2. Petitioners contend (Pet. 14–18) that the wiretap order lacked probable cause and failed to identify all the persons whose conversations were to be intercepted and was therefore invalid. These contentions were thoroughly considered and properly rejected by the court below (Pet. App. A–5 to A–8), upon whose opinion we rely.

3. Petitioners contend (Pet. 19–27) that "[s]ix of the eight persons named in the indictment * * * were proven to be merely clerks * * * who exercised no control over the gambling business * * *" (Pet. 20) and therefore that the gambling business was not "con-

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tioning for a writ of certiorari to review a decision by the Fourth Circuit invalidating wiretap orders, the court relied on the fact that the initial application had been approved by the Executive Assistant to the Attorney General. The court of appeals in that case, although *sub silentio* upholding the suppression of evidence derived from an extension of the wiretap which the Attorney General had personally authorized the United States Attorney to apply for, did not explain the reason for this result. The court did not discuss the ground relied on by the district court there for suppressing the evidence—the inaccurate indication that the authorization to apply for a wiretap order had come from Assistant Attorney General Wilson. In conjunction with our certiorari petition in *Giordano*, we have filed a memorandum acquiesing in the certiorari petitions filed by the defendants in the *Pisacano* and *Becker* cases. The present case is like the *Cox* case in which we oppose certiorari as not warranted, since there is no conflict among the courts of appeals in this factual setting.

ducted" by five or more persons, as required for convic
tion under 18 U.S.C. 1955(b)(1)(ii). Assumin
arguendo that six of the petitioners were "merel
clerks" in the operation of the gambling business, it i
nevertheless clear from the legislative history of 1
U.S.C. 1511, enacted simultaneously with 18 U.S.C. 19
as part of the Organized Crime Control Act of 1970, Pu
L. 91–452, 84 Stat. 922, *et seq.*, that "clerks" fall withi
the requirement that the gambling business must be o
which "involves five or more persons who conduct * *
all or part of such business."[7] See *United States*
Becker, supra, 461 F. 2d at 232; *United States* v. *Harr*
460 F. 2d 1041, 1048–1050 (C.A. 5), certiorari denie
October 10, 1972, No. 72–87; *United States* v. *Riehl,* 4
F. 2d 454, 459 (C.A. 3).

4. Petitioners also make the related contenti
(Pet. 24) that 18 U.S.C. 1955, as construed below, e
ceeds the commerce powers of Congress. The conte
tion is without merit. In considering the gambli
provisions of the Organized Crime Control Act
1970, Congress relied upon the findings of the Pre
dent's Commission on Law Enforcement and Adm
istration of Justice, which concluded that gambli
systematically operated by "layoff" bets through
network of local, regional, and national layoff n

[7] The House Report (H. Rep. No. 91–1549, 91st Cong., 2d S
(1970)) analyzing the Organized Crime Control Act of
stated with respect to the identical definition of "illegal gamb
business" in 18 U.S.C. 1511 (1970 U.S. Code Cong. & Admin. N
p. 4029): "The term 'conducts' refers to both high level bo
and street level employees. It does not include the player in
illegal game of chance, nor the person who participates in
illegal gambling activity by placing a bet."

throughout the nation, is " 'the greatest source of revenue for organized crime.' " *United States* v. *Becker, supra,* 461 F 2d at 233. Hence, the opinion of this Court in *Perez* v. *United States,* 401 U.S. 146, which upheld Title II of the Consumer Credit Protection Act, Pub. L. 90–321, 82 Stat. 159, *et seq.,* prohibiting loan sharking, applies with equal force to the prohibition of illegal gambling businesses contained in 18 U.S.C. 1955. The courts of appeals have uniformly so held. See *United States* v. *Becker, supra; Schneider* v. *United States,* 459 F. 2d 540 (C.A. 8), certiorari denied, October 10, 1972, No. 72–98; *United States* v. *Harris,* 460 F. 2d 1041, 1043–1049 (C.A. 5), certiorari denied, October 10, 1972, No. 72–87; *United States* v. *Riehl,* 460 F. 2d 454, 458 (C.A. 3).

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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